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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT and WALTER BRIEHL,
Petitioners,

v.

JOHN FOSTER DULLES, Secretary of State.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals in *Briehl* v. *Dulles* (R. 171-246) is reported at 248 F. 2d 561. *Kent* v. *Dulles*, which adopted the reasoning of *Briehl*, is reported at 248 F. 2d 600 (R. 87-90). The opinions of the District Court are not reported; they appear at R. 169 and R. 84 respectively.

Jurisdiction

The judgments of the Court of Appeals were entered on June 27, 1957 (R. 91 (*Kent*); 247 (*Briehl*)). The petition for certiorari was filed on September 18, 1957, and certiorari was granted on November 25, 1957 (R. 253). The jurisdiction of the Court rests on 28 U. S. C. § 1254 (1).

Statutes and Regulations Involved

The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. § 211a; the Internal Security Act of 1950, § 6, 64 Stat. 993, 50 U. S. C. § 785; the Immigration and Nationality Act of 1952, § 215 (a), 66 Stat. 190, 8 U. S. C. § 1185; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999. The pertinent provisions of these statutes are reproduced in the Appendix, *infra*, pp. 59-61.

The principal regulations involved are 22 CFR § 51.135 and § 51.142, which read as follows:

> § 51.135 *Limitations on Issuance of Passports to Persons Supporting Communist Movement.*. In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to wararnt the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;
>
> (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage

in activities which will advance the Communist movement for the purpose, knowingly and willfully of advancing that movement.

§ 51.142 *Oath or Affirmation by Applicant as to Membership in Communist Party.* At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

Other pertinent passport regulations are reproduced in the Appendix, *infra*, pp. 66-78.

Questions Presented

1. Whether the Secretary of State is authorized by law to condition the issuance of passports to American citizens on their meeting political standards devised by him.

2. Whether the Secretary's passport regulations (22 CFR 51.135-51.170, hereinafter referred to as "the passport regulations"), are invalid because they are not authorized by Congress and because they conflict with controlling statutes, *viz.*, section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. § 785; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999.

3. Whether the passport regulations, on their face and as applied to petitioners, abridge First Amendment rights of speech, belief and association; constitute a bill of attainder and an *ex post facto* law in violation of Article I, section 9, of the Constitution; and deprive petitioners of their rights of travel and to due process under the Fifth Amendment.

Statement of the Case

A. The Proceedings in the Passport Office

These cases arise as a result of the refusal of the Secretary of State to issue passports to the petitioners. The events which culminated in the denial in each case are as follows:

(1) Dr. Walter Briehl

Dr. Walter Briehl has been a practicing psychiatrist for twenty-seven years (R. 108). He is associated with many psychiatric hospitals and clinics and has taught psychiatry (R. 108). During the war he had the rank of Lieutenant-Colonel and served as Chief Psychiatrist in several Army hospitals (R. 109).

Dr. Briehl is a member of leading professional societies in the fields of medicine and psychiatry. As their representative he attended conventions on mental health held abroad as recently as 1953 and thereafter reported on such proceedings to his professional societies (R. 109).

In April 1955 Dr. Briehl applied for the renewal of a passport which had been issued to him two years earlier (R. 109). He stated in his application for renewal that he needed a passport in order to attend an international psychoanalytic conference in Geneva and a World Mental Health Organization Congress in Istanbul (R. 101). Miss Frances G. Knight, the Director of the Passport Office replied with the following request:

> " . . . it would be helpful to the Department if you would furnish an affidavit setting forth whether you are now or ever have been a Communist, and explain your connections with the Book Shop Association, St. Louis, Missouri; the Civil Rights Congress; the Hollywood Arts, Sciences and Professions Council; and the Los Angeles Committee for the Protection of the Foreign Born. Your affidavit

should set forth your connection with any other Communist front organizations with which you may have been associated" (R. 117-118).

Dr. Briehl's counsel advised Miss Knight that the affidavits requested would not be filed on the ground that the Department had no power, under the Constitution, to require him to furnish such information (R. 118).

Thereafter Miss Knight advised Dr. Briehl that the Department "is obliged to disapprove your request tentatively" under 22 C. F. R. § 51.135 for the following reasons:

> "In your case it has been alleged that you were a Communist. Specifically it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Professions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the Freedom Stage, Incorporated" (R. 120, 121).

The same letter offered Dr. Briehl an informal hearing at which "you may present your case and all relevant information informally to the Passport Office" and "you will be required to submit a sworn statement as to whether you are now or ever have been a Communist" (R. 121).

There was further correspondence, in the course of which Dr. Briehl's counsel requested an evidentiary hearing (R. 122) in accordance with the decision in *Nathan* v.

Dulles, 129 F. Supp. 951; see also *Dulles* v. *Nathan*, 225 F. 2d 29 (R. 123).

An "informal hearing" was eventually held on August 30, 1955 (R. 114, 127-156). The passport officials offered no evidence in support of the allegations made in Miss Knight's letters. They did not dispute Dr. Briehl's citizenship or the sworn statement of the purpose of his trip as set forth in his passport application. They rejected his request that evidence against him, if such there were, be presented at that time.

The Passport Office was interested solely in examining Dr. Briehl as to his political associations. He declined to submit to such examination, asserting that the questions were not relevant to his application for a passport and impinged upon his constitutional rights, and asserting further that it was the burden of the State Department to present evidence against him before he could be required to offer evidence in reply (R. 127-150). Thereupon the Passport Office refused to take any further action upon his application for a passport (R. 159-160), and the Board of Passport Appeals refused to entertain an appeal, on the ground that there was no "adverse decision" in Dr. Briehl's case (R. 162).

(2) Mr. Rockwell Kent

Mr. Rockwell Kent is an American citizen by birth, internationally famous as an artist, writer and explorer.[1] His etchings and paintings are exhibited in numerous libraries and museums throughout the world. His murals appear in government buildings, his illustrations of the books of Chaucer, Shakespeare and Melville are known to millions of readers in this country. He has served on numerous commissions and juries in the field of art.

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[1] Columbia Encyclopedia (1950), p. 963.

For many years Mr. Kent had used passports for travel abroad. Much of his best work as an artist and a writer was done upon the basis of travel to such out of the way places as Greenland and Tierra del Fuego.[2] For the last seven years, however, Mr. Kent has been prevented from traveling abroad by reason of the Secretary's refusal to give him a passport (R. 8-9). On June 1, 1955 he applied for a passport in order to attend a meeting in Finland on June 22d (R. 28). The Department sent a letter of tentative denial on June 29th, stating:

> "* * * in your case it has been alleged that you were a Communist.
>
> The Department has concluded that your case also falls within the scope of sub-sections (b) and (c) of Section 51.135 of the Regulations. It is the opinion of the Department that the evidence indicates on your part a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time" (R. 23).

The Director's letter of tentative denial charged that Mr. Kent had been "affiliated" with numerous "Communist front organizations" and that he had an "interest in and espousal of the Communist cause" (R. 23). This was supported by particular reference to articles written by him for groups which were on the Attorney General's list or had been cited by the House Committee on Un-American Activities, and to speeches by him before such groups (R. 22-28, 79-82). The Department did not suggest that any of these associations or activities constituted a violation of law.

The following is a fair sampling of the charges:

> "Your interest in Communism and your sympathetic support for the Soviet have been expressed in your prolific writings published both in the Communist and non-Communist Press" (R. 23).

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[2] See Kent, IT'S ME O LORD (1955).

> "You were a speaker at a dinner in 1954 in honor of Eslanda and Paul Robeson" (R. 24).
>
> "You allegedly made a speech in 1952 in which you urged that Communists in the United States must be defended" (R. 25).
>
> "You are a sponsor of a four page petition addressed to Attorney General Herbert M. Brownell criticizing the use of paid informers" (R. 24-25).
>
> "signer of a petition sponsored by the Peace Information Center urging ban on use of atomic bomb" (R. 27).
>
> "It has * * * been alleged that you sought the repeal of the Walter-McCarran Law" (R. 25).
>
> "[you] urged clemency for Rosenbergs" (R. 25).
>
> "[you] urged release on bail of Steve Nelson who was convicted of sedition in Pennsylvania" (R. 25).

Mr. Kent's reading matter and personal friends were also deemed relevant to the Department's action upon his application:

> "You are alleged to have been a long time subscriber to the 'Daily Worker', 'The Worker', and the 'U.S.S.R. Information Bulletin'; and you repeatedly include nationally known Communists among your friends and house guests" (R. 24).

Miss Knight's letter advised Mr. Kent that he could have an informal hearing. "In such case you will be required to submit a sworn statement as to whether you are now or ever have been a Communist." (R. 27) Subsequently the Department also requested "a complete explanation of your alleged Communist activities as set forth in a previous letter from the Department to you" (R. 31). The matter was not further pursued by Mr. Kent since the Department's delay had precluded the trip (R. 28).

On August 2, 1955 Mr. Kent again applied for a passport. He stated under oath that the sole purpose of his

proposed travel was "prosecution of profession and pleasure" (R. 39). This application was denied "tentatively", reference being made to the prior letter of denial referred to above (R. 37).

On November 8, 1955 an "informal hearing" was held (R. 34-64). The Department produced no witnesses. It offered in evidence Mr. Kent's recent autobiography, *"It's Me O Lord"* for the purpose of showing that he had joined many organizations on the Attorney General's list (R. 45) and to demonstrate other of Mr. Kent's activities of a similar nature (R. 46-51, 57). The Department also offered the transcript of a hearing before a Congressional Committee for the purpose of showing that Mr. Kent had asserted his constitutional privilege under the Fifth Amendment before that Committee (R. 56).

Mr. Kent was asked and declined to submit a statement under oath "as to membership in the Communist Party or membership in the Communist front organizations" (R. 59). When asked to submit evidence of conduct "antagonistic to the Communist Party, that showed that he did something not along the line" (R. 62), Mr. Kent responded:

> "I think that I could very easily think of a number of things that I have done and principles I have advocated that they wouldn't like one single bit. I would have to think about them. Because I have not been concerned • • • whether • • • what I believe in is believed by others, by the Communists or what. But, I'm not going to say that because, as I said before, I consider this irrelevant" (R. 62).

The hearing was concluded with a statement by the representative of the Passport Office as follows: "I think it's only fair to apprise Mr. Kent of the fact that we have additional information in our files which we are precluded by the Security Regulations from divulging at this hearing" (R. 64).

The Director of the Passport Office declined to give him a passport on the basis of the allegations against him, stating:

> "At the informal hearing, at which you were represented by counsel, you declined to furnish a statement, subscribed and sworn to under oath or affirmation with respect to your present or past membership in the Communist Party, insisting that such a statement was irrelevant. Moreover, you refused to discuss or furnish any information concerning your alleged affiliation with Communist-front organizations or other alleged Communist activities on the same ground. These allegations, which you have neither refuted nor explained, were detailed in my letter to you of June 29, 1955" (R. 73).

Mr. Kent, through his counsel, requested the Board of Passport Appeals to entertain an appeal from this action but received no reply (R. 74-5, 16).

B. The District Court Actions

Having no further recourse in the Department, petitioners instituted separate law suits in the District Court for the District of Columbia seeking decrees adjudging their right to passports and directing their issuance (R. 2, 100).

The Secretary's answers did not deny the essential facts set forth in the complaints (R. 4, 104). Petitioners moved for summary judgment and for preliminary injunctions prohibiting the Secretary from denying them passports, supporting these motions with the correspondence and the proceedings before the Passport Office, as described above (R. 7, 107-108). The Secretary moved for judgment on the pleadings or in the alternative for summary judgment (R. 76, 163).

In each case, the Secretary attached to his motion an affidavit by Miss Frances G. Knight, Director of the Passport Office. This affidavit did not dispute any of the factual

statements made by petitioners. In each case the affidavit recited the reason why the Director believed it necessary and still "deem[s] it necessary, to require the plaintiff to execute, as a part of his application, an oath or affirmation as to present and past membership in the Communist Party" (R. 79, 165).

In Mr. Kent's case the reasons were said to be "information set forth in (a) government publications, news reports, and other public sources; (b) records of the Department of State and confidential reports from its officers in foreign countries, and (c) confidential reports from another agency of the Government" (R. 79). The affidavit recited alleged activities and affiliations of Mr. Kent for the past 20 years. These were similar to those set out in the letter of tentative denial and described above. (R. 79, 84).

As to Dr. Briehl, the Director purported to rely on "reports of a confidential character furnished the Department by another agency of the Government" (R. 165). The affidavit then went on to recite allegations substantially identical to those set out in the letter of tentative denial which is referred to *supra*, p. 5 (R. 165-166). Here the latest incident was alleged to have occurred in 1951 (R. 165).

In neither case did any of the allegations charge or even suggest any illegal conduct. On the contrary, all of the alleged activities were protected by the First Amendment.[3]

The District Court denied the petitioners' motions and granted those of the Secretary upon the ground that the petitioners had failed to exhaust their administrative remedies and had failed to qualify for a passport—the reason

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[3] The sole exception was the reference to Mr. Kent's reliance on his privilege under the Fifth Amendment when summoned as a witness before the McCarthy Committee (R. 82).

in each case being the refusal to execute "the non-Communist affidavit which the valid regulations require" (R. 84, 169-172).

C. The Proceedings in the Court Below

The Court of Appeals heard the cases *en banc*. Four separate opinions resulted. By a vote of 5 to 3, it held that "the disputed regulations of the Secretary are valid and that Dr. Briehl did not qualify himself for a passport under them" (R. 198). A similar decision was made in Mr. Kent's case (R. 89). Accordingly, the judgments of the District Court were affirmed (R. 91, 247).

Summary of Argument

I.

The denial of a passport is a denial of the right to travel. It is unlawful to travel to European countries without a passport. Even where lawful, it is, as a practical matter, a requisite for admission to most countries. Accordingly, a denial of a passport must be justified as a denial of the right to travel.

This right is protected by the Constitution. It is an attribute of personal liberty. In many instances, as in the case of petitioners here, it is important to the pursuit of a livelihood and the furtherance of a career. The educational value of travel and the opportunities it affords for the exchange of ideas and experiences justifies its characterization as an exercise of First Amendment rights. It is important also for the creation of an informed citizenry which, on the basis of its own independent observation of countries abroad, can critically participate in the formation of our government's foreign policy. Finally, the action of the Government in preventing the citizen from leaving the country is *pro tanto* to imprison him.

II

The 1952 regulations under which the Secretary of State denied passports here were the first regulations in American history to establish political, or any substantive, qualifications for a passport other than citizenship. The Secretary, however, lacked the authority to issue these regulations.

The regulations purport to find their source of authority in the provisions of 22 U. S. C. § 211a enacted in 1926. This statute however was merely a reenactment with minor revisions of the first passport Act enacted in 1856. Its limited purpose was to centralize the issuance of passports in the Department of State. The statutes were enacted in a period when passports were not a mechanism for the control of travel and hence Congress could not have intended by this legislation to control travel in any respect. The legislative history of the statutes demonstrates that the sole discretion vested in the executive under these statutes was to issue regulations of an administrative and routine nature; and not to establish classes of eligibility for passports. This has been the construction given the statute for almost a century prior to the 1952 regulations and deference must be accorded to this administrative construction.

Moreover, the construction given to the 1926 statute by the Court below would render it unconstitutional. If viewed as a grant of power to the Executive to control travel, the absence of any standards as a guide to the exercise of that power, would constitute an invalid delegation of power.

Nor can any authority for the regulations be found in the provisions of 8 U. S. C. § 1185(b). This statute makes it unlawful during a national emergency, proclaimed by the President, for a citizen to leave the country without a

passport. But this statute contains no standards whatever for determining to whom passports should be denied and it does not grant authority to the Executive to make such determination. There is no basis either in the language of the statute or in its legislative history to support the assumption of the court below that Congress by this statute was legislating travel control in the field of Communism. Thus, to construe this statute as a grant of power to the Executive to control travel would encounter, because of the absence of standards, the same constitutional objections as in the case of the 1926 statute.

The construction given to these statutes by the Court below is contrary to Congressional intent as manifested in other legislation. Congress did establish in § 6 of the Internal Security Act of 1950 a class of citizens who were ineligible to receive passports. That classification is in sharp variance from the classifications set out in the Secretary's regulations. The court below found justification for the Secretary's regulations in the Congressional findings of the Internal Security Act. However, it must be presumed that the Congressional judgment as to the remedy to be provided on the basis of such finding was adequate and that Congress did not intend to deny passports to citizens in categories other than those covered by § 6. The State Department has indicated its awareness that the regulations go far beyond the 1950 statute and has sought to justify the regulations on the ground that they were within the "spirit" of the statute. But the Secretary was not authorized by an assumed spirit of the legislation to implement his notion of Congressional desires by issuing regulations of a legislative character going far beyond the statute enacted by Congress.

Secondly, the regulations conflict with Congressional policy as set forth in the Expatriation Act of 1868 favoring freedom of expatriation. Expatriation is not possible without freedom to depart from one's country.

III

The regulations establishing classes of citizens who may not leave the country are an exercise of law-making authority beyond the power of the executive branch. Under our constitutional system the Executive has no power to make law in any field, whether it be that of foreign relations or otherwise.

Secondly, the denial of the right to travel is not the conduct of foreign affairs. It involves the relationship of the government to its own citizens and constitutes a restriction upon their liberty. Such a power cannot be considered to be an inherent power of the Executive.

IV

a. The regulations as written and applied violate the First Amendment because the interference with petitioners' right to travel is explicitly based upon their past political associations, writings, speeches and beliefs which were entirely lawful and therefore were protected by the First Amendment. The regulations as applied also impose a prior restraint upon the future exercise of those rights, preventing the petitioners from traveling abroad for professional reasons; in the one case to consult with colleagues in the field of medicine and in the other to paint pictures.

These restrictions upon the petitioners affect the rest of our citizens who may find it necessary to adjust themselves in their beliefs, speech and associations in order to be able to travel.

If there are any circumstances under which this fundamental liberty of movement may be curtailed they could only be such as present a substantial threat to the security of the state. No such threat exists in the exercise of

the right of travel generally or by petitioners whose legitimate reasons for travel are not contested by the government.

The government's alternative suggestion that a passport is a kind of diplomatic document guaranteeing protection is neither a correct construction of the passport nor a justification for its denial. The explanation of the Court below, namely that "adherents" of the Communist movement may communicate with others abroad or that they may provoke the Soviet Union into hostile action is purely speculative, unsupported by petitioners' past exercise of First Amendment rights in this country and is not a justification for so drastic a limitation upon movement.

b. The Department is completely indifferent to the actual purposes of the proposed trips. It asserts, in effect, that persons who have expressed themselves on political, social and economic issues differently from those of the government are inherently unfit for travel because of an unproven potentiality for undisclosed danger. This argument is so irrational, particularly where First Amendment rights are involved, that it denies substantive due process.

c. The Department was not legally justified in rejecting petitioners' passport applications on the ground that they refused to execute affidavits as to membership in the Communist Party and related matters. This requirement was imposed by the Secretary, not by Congress, as a device to shift the burden of proof from the Secretary, where it belongs, to the citizen. It constitutes a test oath of the kind previously held invalid by this Court. Such oaths have been upheld only where imposed by statute and under circumstances radically different from the present one, *viz.* in connection with state elections, state employment and the use of the facilities of the National Labor Relations Board. None of these cases involved as fundamental a liberty as freedom of movement.

d. The regulations predicate ineligibility for travel upon past conduct antedating even the date the regulations were promulgated. This is penal action retrospective in character and violative of Article 1, § 9 of the Constitution. The regulations also proscribe the issuance of passports to persons who "are members of the Communist Party" § 51.135(a). The disqualification of a group named by the government is the traditional form of a bill of attainder.

e. The regulations deny due process in fundamental respects. They employ such vague criteria as the "interests" of the Communist Party and "consistent and prolonged adherence to the Communist Party line" § 51.141. Such vague terms are particularly pernicious where they are based upon and adversely affect the exercise of First Amendment rights.

f. The vagueness of the Department's regulations are equalled only by the unfairness of its procedures. The Secretary makes "allegations" based upon reports of persons usually unknown to the State Department even by name. The hearings consist of an examination of the applicant under oath as to his political beliefs and associations; no witnesses are produced against him. The Secretary's decision is based upon alleged evidence concealed from the applicant. Such procedures violate due process and this Court's decisions that administrative action predicated upon undisclosed facts is invalid.

ARGUMENT

I.

Petitioners have a constitutional right to travel and hence to a passport.

A. The Denial of a Passport is a Denial of the Right to Travel

Whatever the role of a passport in earlier days, it is now a prerequisite to travel in most parts of the world. As stated by the court below in *Shachtman* v. *Dulles*, 225 F. 2d 938, 941: "Earlier in our history * * * it [a passport] was * * * a desirable incident to travel, not a necessity * * *. Now it is unlawful for a citizen to travel to Europe and impossible to enter European countries without a passport." See 8 U. S. C. § 1185(b) and Proclamation No. 3004, 18 F. R. 489 (1953). Even in the Western Hemisphere, a passport is a requisite for admission to most countries.[4] Under such circumstances, a denial of a passport must be justified as a denial of the right to travel, a right which, as we shall show, is protected by constitutional guarantees.

B. The Right to Travel is Protected by the Constitution

Freedom of movement is an attribute of personal liberty, serving important purposes in a democratic society. In *Shachtman* v. *Dulles, supra*, at 941, the court below affirmed the right to travel as a basic element of the liberty protected by the Fifth Amendment:

> "The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the

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[4] *Travel Abroad—Frontier Formalities* (a joint publication by UNESCO and International Union of Official Travel Organizations).

> Fifth Amendment that 'no person shall be • • • deprived of • • • liberty • • • without due process of law.' ''

Such great jurists as the former Chief Justice Centlivres of South Africa, Sir Alfred Denning and Professor Hans Kelsen agree upon the inclusion of "freedom of movement within and outside the limits of their own country among the fundamental rights of man."[5]

The right to travel is deeply rooted in Anglo-Saxon law. Demands for freedom of travel abroad were acknowledged in England as far back as Magna Carta. McKechnie, *Magna Carta* (1914) 398-407. The right became established in the common law by the early seventeenth century. Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Georgetown L. J., 63, 70 (1952); Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L. R., 853, 868 (1954).

The right to travel was by definition an essential element of life in colonies created by emigants. Chafee, *Three Human Rights in the Constitution* (1956) 162-213. Freedom of movement finds expression in Colonial charters, in the Massachusetts Body of Liberties, in the Constitution of the State of Pennsylvania and in the Articles of Confederation (*ibid*).[6]

The Constitution has no express provision on the freedom of travel, either within the United States or abroad. However, in light of the history of the common law there is no doubt that the freedom of citizens to come and

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[5] A. P. Van de S. Centlivres, *The Constitution of the Union of South Africa and the Rule of Law* (*Government under Law*) (1956) p. 423; See also Sir Alfred Denning, *Freedom Under Law* (*The Hamlyn Lectures*) (1949); 5 *Sammlung der Erkenntnisse des Verfassungsgerichtshofes* 137 (Dec. 14, 1925) (Kelsen, J.).

[6] Jefferson referred to "a right, which nature has given to all men, of departing from the country in which chance, not choice has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness." Jefferson, *Papers*, I, 217, quoted in Rossiter, *Seedtime of the Republic* (1953) 378.

go was among the liberties embodied in the Constitution. Note, 41 Georgetown L. J., *supra*, at 71-72. And in *Williams* v. *Fears*, 179 U. S. 270, 274, this Court in discussing interstate movement said:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty * * *."

See also *Crandall* v. *Nevada*, 73 U. S. 35; *Edwards* v. *California*, 314 U. S. 160 and *Hague* v. *C.I.O.*, 307 U. S. 496.

In *Bauer* v. *Acheson*, 106 F. Supp. 445, 451, a three judge court, referring to *Williams* v. *Fears*, *supra*, said:

> "* * * It is difficult to see where, in principle, freedom to travel outside the United States is any less an attribute of personal liberty * * *. Personal liberty to go abroad is particularly important to an individual whose livelihood is dependent upon the right to travel * * *."

This view is accepted by the court below in the instant and other recent passport cases (R. 192). See *Shachtman* v. *Dulles*, *supra*; *Boudin* v. *Dulles*, 235 F. 2d 532, aff'g and modif. 138 F. Supp. 218.

The right to travel is a fundamental aspect of liberty. It is appropriately included in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948,[7] and in various treaties of friend-

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[7] United Nations Department of Public Information, Universal Declaration of Human Rights (1949), S. Doc. 123, 81 Cong. 1st Sess., 1156. Article 13 provides:

> "(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and return to his country."

Freedom of movement is necessary to the exercise of other basic rights protected by the Declaration—those of expatriation (*infra*, p. 36), emigration and asylum. On emigration see Lauterpacht, *International Law and Human Rights* (1950); Lauterpacht, *An International Bill of Rights of Man* (1945); Stoessinger, *The Refugee and the World Community* (1956). On asylum, see Weis, *Nationality and Statelessness in International Law* (1956) *passim*.

ship, commerce and navigation to which the United States is a party.[8]

Its essentiality to a democratic society is clear from the fact that "freedom of mobility and political power in the hands of the people have generally appeared at the same time * * * one of the first acts of any dictatorship or police state is to repress the free movement of the population." Vestal, *Freedom of Movement*, 41 Iowa Law Review, 6, 13.[9] Cf. Comment, *Passport Refusals for Political Reasons, Constitutional Issues and Judicial Review*, 61 Yale L. J. 171, 202 (1952).

The right to work and the freedom to move about are intimately connected. In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, this Court said that the term "liberty" in the Fourteenth Amendment includes "* * * the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; [and] to earn his livelihood by any lawful calling * * *."[10]

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[8] See, for example, Treaty between the United States and the Italian Republic, Feb. 2, 1948, Art. 1, § 1, 2 U. S. Code Cong. Svc. (1948) 2814; and see Vestal, *Freedom of Movement*, 41 Iowa L. J., 25, n. 61. Recently adopted constitutions also provide for free mobility. *Ibid.*, p. 13, n. 26.

[9] Italy: Royal Decree of November 6, 1926, No. 1848; Soviet Union: Decree of October 20, 1921, discussed in 1 Fauchille, *Traite de Droit Internationale Public* (8th ed. 1922) 905; Nazi Germany: See 2 *Scelle Precis du Droit des Gens* (1934) 77; Cuba: Legislative Decree No. 1463 (Gaceta Official of June 11, 1954), United Nations Yearbook on Human Rights for 1954 (1957) 66; Union of South Africa: Departure from the Union Regulation Act (1955), Government Gazette No. 5509. See also Reale, *Passport*, 12 Encycl. Soc. Sc. (1934), 13-16.

[10] It is significant that when restrictions on the right of exit from England were imposed after its initial broad grant in Magna Carta, merchants, whose vocation depended upon their mobility, were as a rule excepted. Note, 41 Georgetown L. J., *op. cit. supra*, at 66-69 (1952). The concept was summed up by Msgr. Edward Swanstrom, in an address to the National Catholic Welfare Conference, when he said:

> "The inherent right of man to move to parts of the earth where his productive capacities can be put to use stems from the Christian view of property and of the world as a whole",

quoted in Vestal, *op. cit. supra*, 41 Iowa L. R. at 11, n. 17.

Obviously, the artistic and scientific work of the respective petitioners is interfered with by the restrictions imposed on the places where they can perform it, their earning powers may well be curtailed and their professional standing impaired.

The educational value of travel is as real today as it was for those who, in an earlier day, took the Grand Tour.[11] The close relationship between intellectual progress and freedom of movement is virtually an axiom in the scientific field today. Hence, the vigorous criticism by educational, scientific and government leaders of our restrictive passport and visa policies.[12]

Judge Wyzanski has brilliantly assimilated travel to the exchange of ideas and experiences protected by the First Amendment:

> "This travel does not differ from any other exercise of the manifold freedoms of expression—from the right to speak, to write, to use the mails, to publish, to assemble, to petition. In all these liberties the principal element is the stretching of the mind to accommodate the growing spirit." Wyzanski, *Freedom to Travel*, Atlantic Monthly, Oct. 1952, 66, 68.

It is essential, in a democracy, that citizens acquaint themselves at first hand with the effects abroad of our

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[11] See *e.g.* C. P. Brand, *Italy and the English Romantics* (1957); Malone, *Jefferson and the Rights of Man* (1951) 112-150; Karamazin, *Letters of a Russian Traveler (1789-1790)* (1957).

[12] See *e.g.* the testimony of Dr. Warren Weaver, Vice-President of the Rockefeller Foundation, before a House Government Operations Subcommittee on Government Information (N. Y. Times, Jan. 23, 1958, pp. 1, 9); also the testimony of Geoffrey F. Chew, Chairman, Passport Committee, Federation of American Scientists, (Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings, Nov. 15-16, 1955, 84th Congress, 1st Sess., herein called the "*Hennings* Hearings", pp. 86-103; Berkner, *Earth Satellites and Foreign Policy*, Foreign Affairs, Jan. 1958, 221 at 226, 229-30; Shils, *The Torment of Secrecy*. (1956); Grundfest, *Science and the Department of State*, Science, Oct. 12, 1956, p. 687.

government's policies, foreign and domestic, and with conditions abroad which might affect such policies. *Chafee, supra* at p. 196; Comment, 61 Yale L. J. *supra* at 191.[13]

Moreover, travel is an aid to the free interchange of ideas among nations; to the increased knowledge of foreign countries and the better understanding of one's own country. One of our national objectives is "to lower the barriers which now impede the opportunities of people to travel anywhere in the world for peaceful, friendly purposes, so that all will have a chance to know each other face-to-face."[14]

Finally, to prevent a citizen from leaving the country is *pro tanto* to confine him within the limits of the United States, and is accordingly a restriction on his liberty. *Cf. Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980. According to Blackstone, one of the attributes of personal liberty at common law was the "power of locomotion, of changing situation, or moving one's person to whatever place one's inclination may direct", 1 *Commentaries* 134. And it has been observed that "the distinction between restriction to a jail, to a city, to a state, or a nation is merely one of degree." Comment, 61 Yale L. J. *supra* at 190.

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[13] See, for example, the remark of Senator Allen J. Ellender that impressions he gained first hand on a trip abroad "differ sharply" from those he received from the State Department. New York Times, Sept. 6, 1955, p. 4, col. 3.

[14] President Eisenhower, quoted in *The Geneva Conference of Heads of Government* (1955), 63. And President Truman wrote to Nikolai M. Schvernik, President of the Soviet Presidium, that "peoples who are denied the normal means of communication will not be able to attain that mutual understanding which must form the basis for trust and friendship. We shall never be able to remove suspicion and fear as potential causes of war until communication is permitted to flow, free and open, across international boundaries." N. Y. Times, July 8, 1951, p. 5, col. 1. This policy is expressly set forth in the United States Information and Educational Exchange Act, Public Law 402, 80th Congress, 2d Sess. (1948). See also Colligan, J., *Americans Abroad*, State Dep't Bulletin, May 3, 1954, Vol. 30, No. 775; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Exchanges in the Cultural, Technical and Educational Fields, N. Y. Times, Jan. 28, 1958, p. 8.

All of the above considerations apply in the cases of the petitioners. Each desires to go abroad in order to further his livelihood and his career. Each has shown a creditable concern with public issues, and their travel abroad would enhance their ability to fulfill their responsibilities as citizens.[15]

II.

The Secretary of State lacked the authority to issue the regulations of August 28, 1952 under which petitioners were refused passports.

A. Genesis of the Regulations

Although passports have been issued throughout our history, it was not until the last decade that the Secretary of State asserted authority to restrict the right to travel abroad because of a citizen's political views or associations. This claimed authority, first exercised after the close of World War II, was originally applied without any formal regulations, and denials were based upon the formula that the issuance of a passport was "contrary to the best interests of the United States." See Note, *"Passport Denied": State Department Practice and Due Process*, 3 Stanford Law Review 312 (1951); Comment 61 Yale L. J. *supra* (1952).

In *Bauer* v. *Acheson*, 106 F. Supp. 445, a three judge court invalidated the Secretary's procedures. Thereupon he promulgated the regulations of August 28, 1952 (Appendix, [illegible]), the purported basis for the action taken here. These regulations for the first time in American history establish political standards for travel abroad. More significantly, they are the first regulations in American history to establish any substantive qualifications for a passport other than citizenship.

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[15] See Chafee, *op. cit. supra*, 196.

We will show that the Secretary was not authorized to issue these regulations by statute or otherwise, and that if he were, the regulations would be unconstitutional on their face and as applied.

B. The Claimed Statutory Authority

(1) 22 U. S. C. § 211a

The regulations purport to find their source of authority in "paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR § 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat 887; 22 U. S. C. § 211a)." (17 F. R. 8013; Appendix, 66.) The statute in question states in pertinent part:

> "The Secretary of State may grant and issue passports • • • under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports."

Pursuant to this statute the President on March 31, 1938 promulgated Executive Order No. 7856, 3 F. R. 681, 22 CFR § 51.1 *et seq.*, which, together with the 1926 statute, remains to this date the Secretary's basic mandate and source of authority. The Executive Order repeats certain statutory provisions and in addition sets forth various regulations, prescribing the contents of applications, fixing fee requirements and exemptions therefrom, and similar matters. It also authorizes the Secretary to issue, revoke and deny passports and to make regulations "additional to the rules in this part and not inconsistent therewith", 22 CFR § 51.77.

The 1926 statute, which forms the claimed authority for the Secretary's regulations, was not new law. It was only a reenactment, with minor revisions, of the first pass-

port legislation, enacted a century ago, Act of August 18, 1856, 11 Stat. 60, and amended in 1902, 32 Stat. 386.[16]

The purpose of the 1856 Act was merely to prohibit the issuance of passports by anyone other than the Secretary of State. For the absence of any legislation on the subject had "led to gross abuses" and the issuance by local officials of passports which in many cases were fraudulent and consequently embarrassing to the United States. See 9 Op. A. G. 350 (1859). The purpose of Congress was merely to centralize and control the procedure of passport issuance. See Note, *The Passport Puzzle*, 23 U. Chi. L. Rev. 269 at 272, n. 25 (1956); Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A. B. A. J. 307, 308 (1957), Barnett, *Passport Administration and the Courts*, 22 Oregon Law Review, 193, 194 (1953).

The 1926 statute neither grants nor was intended to grant any additional authority to the Executive. Assistant Secretary of State Carr, testifying before the House Committee on Foreign Affairs with respect to the nature of the rules contemplated by the 1926 statute, stated that

> "these rules are administrative rules * * */[governing] * * * the different things that must be provided for that will come up from time to time under different conditions, different modes of travel and various things that arise in the course of a period of time * * * the object [of the Secretary's rule-making power] being to provide for administrative rules to be issued by the Secretary of State so as to avoid troubling the President with many details."[17]

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[16] The 1902 amendment authorized the issuance of passports to persons "owing allegiance, whether citizens or not," 32 Stat. 386. The purpose of the amendment was to authorize passports to citizens of Puerto Rico, Hawaii and the Philippines, whose allegiance the United States acquired when it extended its sovereignty to those areas. 35 Cong. Rec. 5697, 6588, 57th Cong., 1st Sess. (1902). And see 26 Op. A. G. 376 (1907).

[17] Hearings before the House Committee on Foreign Affairs on H. R. 11947, 69th Cong., 1st Sess. (1926), pp. 5-6.

And the stated reason for the delegation of rule making power to the President was so that Congress "would not be bothered with all these small administrative changes." *Id.*

The regulations issued pursuant to the 1856 and 1926 statutes were of that routine administrative nature. These regulations, whether presidential or departmental, prescribed the identifying information required on an application, the size of passport photographs, the contents of the affidavit of a supporting witness as to the citizenship of an applicant, etc.—all clearly matters of administrative routine.[18] The first regulations of a substantive character issued by the Secretary of State were the regulations of 1952, here in issue.

Thus, for almost one hundred years the Executive construed the passport statutes as authorizing only the power to issue regulations of an administrative character. It was not until 1952 that the statute was invoked as a source of authority to define classes of citizens ineligible for passports. In determining the meaning of the 1856 and 1926 statutes, deference must be accorded to this century of administrative construction. *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322; *National Lead Co.* v. *United States*, 252 U. S. 140; *Five Per Cent Cases*, 110 U. S. 471. The failure of the Secretary to assert any power to make substantive regulations for so long a period is a persuasive indication that no such power was ever granted. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

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[18] See Department of State, *The American Passport*, Chapter IV (1898); Executive Order No. 654, June 13, 1907; Executive Order No. 4359-A, Dec. 19, 1925; Executive Order No. 4392-A, Feb. 12, 1926. Executive Order No. 4488, August 3, 1926; Executive Order No. 5960, June 22, 1932; Executive Order No. 6650, March 23, 1934; Executive Order No. 7856, March 31, 1938; Departmental Order No. 749, March 31, 1938; Departmental Order No. 366, Feb. 12, 1926 (recited in Hearings before the House Committee on Foreign Affairs on H. R. 11947, 69th Cong., 1st Sess. (1926), pp. 25-28; Departmental Order No. 749, March 31, 1938, 22 C.F.R. 51.101-51.134 (Passport Regulations, Department of State Publication 1165 [1938] pp. 20-25).

The position of the majority below that the 1856 and 1926 statutes may be interpreted in the light of a general anti-communist policy as shown by congressional, executive and judicial pronouncements dating from 1950 on, is an absurd anachronism. Such reliance upon a general governmental policy, the inception of which postdates the statute, and without reference to the specific language or legislative history of the statutes themselves, rests on an untenable basis. *Hadden* v. *Barney*, 5 Wall. 107. This is particularly true since passports were not required as a condition to lawful departure in peacetime either in 1856 or 1926 and were therefore merely a convenience for the traveler.[19] Accordingly, Congress could not have intended by this legislation to control travel in any respect.

The construction given to the 1926 statute by the Court below would only serve to render it unconstitutional. For if interpreted as a grant of power to the Executive to control travel, the statute must fall because of its failure to supply any standards for the exercise of that power.

The classical statement on the power of Congress to delegate authority to co-ordinate branches of the government was made by Chief Justice Marshall in *Wayman* v. *Southard*, 10 Wheat. 1, 43. "* * * [I]mportant subjects [he held] must be entirely regulated by the legislature itself [while as to matters] of less interest * * * a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

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[19] Thus *e.g.* the *"General Instructions in Regard to Passports"* of 1873 referred to passports as follows: "Citizens of the United States visiting foreign countries are liable to serious inconvenience if unprovided with authentic proof of their national character. The best safeguard is a passport from the Department certifying the bearer to be a citizen of the United States upon application supported by proof of citizenship." Dept. of State, *The American Passport, supra*, p. 54.

But "before another agency can 'fill up the details', Congress must enact something to be thus supplemented. In the current idiom, the law makers must first adopt a policy or set up an 'intelligible standard' to which administrative action must conform." *The Constitution of the United States of America* (ed. Corwin, 1953), Sen. Doc. 170, 82nd Cong., 2d Sess., p. 75, citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398, and *United States* v. *Rock Royal Cooperative*, 307 U. S. 533, 576. Thus, if viewed as a grant of power, the absence of standards would render the statute unconstitutional as an invalid delegation of law-making power, since Congress cannot delegate to the Executive power to make judgments and issue regulations which are legislative in character. *Miller* v. *United States*, 294 U. S. 435. And since the right to travel is "an attribute of personal liberty," *Williams* v. *Fears*, *supra*, at 274, such standards, totally lacking here, would have to be especially precise. *Saia* v. *New York*, 334 U. S. 558, 560; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C.I.O.*, 307 U. S. 496; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Burstyn* v. *Wilson*, 343 U. S. 495.

The uncontrolled discretion which the view of the Court below would vest in the Secretary would render the statute clearly unconstitutional. "It is settled by a long line of recent decisions of this Court that [a statute] which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub* v. *City of Baxley*, No. 48, Oct. Term, 1957, 78 S. Ct. 277, 282.

Statutes must be narrowly construed to avoid, rather than to create, constitutional problems, particularly where

the suggested construction will, as here, concededly infringe upon fundamental rights. *United States* v. *Rumely*, 345 U. S. 41, 46; *United States* v. *Witkovich*, 353 U. S. 194.

For all of these reasons the 1856 and 1926 statutes must be construed as authorizing the Secretary to issue regulations only of an administrative character. Accordingly, the statute on which the regulations expressly rely does not authorize them.

(2) 8 U. S. C. § 1185(b)

In an effort to avoid the dilemma of the 1926 statute, the court below and the government placed reliance for the Secretary's power to issue the regulations upon the provisions of 8 U. S. C. § 1185(b). This statute provides that during the existence of any national emergency proclaimed by the President "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport." The difficulties of justifying the passport regulations under this statute are even greater than under the 1926 statute.

In the first place, the regulations themselves do not claim authority from this statute but rest exclusively on the authority claimed to be conferred by 22 U. S. C. § 211a. The reasons for this are plain. The regulations were issued on August 28 of 1952. 17 F. R. 8013, 22 C. F. R. §§ 51.135-51.143. 8 U. S. C. § 1185 did not become effective until December 24, 1952. The statute which it replaced, the Act of June 21, 1941, was limited in its operation to time of war or to the duration of the emergency proclaimed on May 27, 1941. This emergency had been terminated on April 28, 1952 by Proclamation No. 2974, 66 Stat. c. 31. Thus, at the time of the issuance of the regulations there

was no statute forbidding the departure of citizens without a passport.[29]

The statutory authority granted by 8 U. S. C. § 1185(b) was expressly invoked by the President on January 17, 1953, Proclamation No. 3004, 67 Stat. c. 31. This proclamation by its terms expressly incorporated and confirmed the existing regulations of the Secretary relating to the necessity of a passport for travel to particular countries during war or national emergency proclaimed by the President; these, which appear at 22 CFR §§ 53.1 to 53.9, had been issued pursuant to the 1941 statute. The proclamation made no reference whatsoever to the regulations allegedly made pursuant to the 1926 statute, *viz.*, 22 CFR §§ 51.135 to 51.170 which prescribe those persons who are ineligible for passports.

In the second place, § 1185 contains no standards whatever for determining to whom passports should be denied. Although it forbids citizens to travel without passports, it nowhere contains a grant of authority to either the President or the Secretary of State to determine which categories of citizens might and which might not receive passports. On the contrary, Congress itself had made that determination two years earlier in the Internal Security Act as appears below. *Infra*, pp. 33-36. Any attempt to base the substantive regulations of the Secretary on § 1185 would stamp that section as an invalid delegation of legislative power, for the reasons which apply to the 1926 passport statute itself.

The courts cannot supply this omission on the theory that Congress intended to grant such power to the Executive. This would be judicial legislation rather than statutory construction. *Ebert* v. *Poston*, 266 U. S. 548.

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[29] A state of emergency had in fact been proclaimed earlier on December 16, 1950, Proclamation No. 2914, 64 Stat., A 455, but could have had no obstructive effect on the travel of citizens since at that time the travel control statute was operative only in actual war or during the specified emergency of 1941. 22 U. S. C. § 223 (1952 ed.), repealed by the Immigration and Nationality Act of 1952, *supra*.

The opinions in the court below demonstrate the vice of judicial legislation. Three of those opinions assumed that Congress, by enacting 8 U. S. C. § 1185, meant that the Executive should have the power to control travel; each of the opinions, however, reached a different conclusion as to the class of citizens Congress intended thus to immobilize. Thus, Judge Prettyman, for four of the judges, thought that Congress intended to deny the right of travel to adherents of the "Communist movement" (R. 191, 198). Judge Washington, concurring, thought that Congress intended to deny travel to "those whose journeying abroad is reasonably found to be contrary to the interests of the United States" (R. 200). Judge Fahy, dissenting, thought that Congress intended to give the Secretary authority to control travel "to prevent the reasonable likelihood of harm to our national defense or to the conduct of foreign affairs." (R. 243).

Leaving aside the vagueness of the standards suggested, the failure of Congress to speak on a question cannot be remedied by judicial legislation. The present case is not one of a broad or vague grant of power with ambiguous standards which under certain circumstances might conceivably be construed so as to save constitutionality. In the present case there was no grant of power at all, and there are no standards for the exercise of the power, not even vague and indefinite ones. (See cases cited, *supra*, pp. 28-29.)

The assumption of the court below that Congress was legislating travel control in the field of Communism or authorizing containment of persons because of their political associations finds no sanction either in the language of the statute or in its legislative history. The statute itself says nothing about adherents of Communism or injury to national defense or interference with foreign affairs. It says nothing about the denial of travel to persons because of membership in organizations cited by the Attorney Gen-

eral or by a Congressional Committee. In short, there was absolutely no legislative material before the court which warranted the construction which it gave to the statute.

(3) The Construction Given Below to the Statutes Is Contrary to Congressional Intent

(a) *The Internal Security Act of 1950*

Congress had itself established, at the time of the passage of the 1952 Act, a class of citizens who were ineligible to receive passports. Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. § 785, made it unlawful for a member of a "Communist organization" to apply for or use a passport, but only after such organization had either registered under that Act, or there was in effect a final order of the Subversive Activities Control Board requiring that organization to register. As of the present date, neither of these events has occurred with respect to any organization; and accordingly this provision is not as yet effective.

Without conceding the constitutionality of this statute, we can note the patent disparities between it and the regulations.

1. Assuming that our constitutional system is capable of placing organizations upon an *Index*, the Act of 1950 establishes a procedure approaching due process: a quasi-judicial determination, based upon the testimony of witnesses in an open hearing and subject to judicial review. See *Communist Party* v. *Subversive Activities Control Board*, C. A. D. C. No. 11850, decided Jan. 9, 1958 upon remand in 351 U. S. 115. But the Secretary has made this determination in his regulations without any hearing, adversary or otherwise.

2. The statutory proscription applies only to members who continue to remain such with knowledge or notice that the organization has registered or has been finally ordered

to do so. 50 U. S. C. § 785(a). *Bona fide* termination of membership, for whose showing the statute provides, 50 U. S. C. § 792(i)(2), ends the applicability of the passport prohibition. In contrast, the Secretary's regulations expressly prohibit passports to *former* members if the Department concludes that they "continue to act in furtherance of Communist "interests" and under its "discipline" § 51.135(a). The Secretary does not charge that either petitioner is a member of the Communist Party; his "allegations" relate to the past (R. 23, 120).[21]

3. Other sections of the regulations deny passports, under the circumstances there set forth, to persons who have never been members if they have followed "the Communist Party line" §§ 51.135(b), 51.141(b).

4. Finally, travel is forbidden to an amorphous group whose purpose is to "advance the Communist movement" § 51.135(c).

It was principally upon the basis of the Congressional findings in the Internal Security Act that the Court below found justification for the Secretary's regulations (R. 176, 200). But since Congress in this same Act decided precisely which class of citizens should be denied passports, it must be presumed that in its judgment the remedy provided was adequate to meet the evil declared. Had Congress intended to go further and to deny passports to citizens in other categories than those covered by the 1950 Act, presumably it would have done so.

The Government has elsewhere recognized that the Internal Security Act of 1950 established a "narrow class • • • ineligible for passports"—a class very different

[21] Indeed, a careful reading of Miss Knight's affidavit in the *Kent* case indicates the speculative nature of the charge even as to past membership (R. 81).

from the amorphous groups condemned by the Secretary's regulations.[22]

The State Department has repeatedly indicated its awareness that the Secretary's regulations go far beyond the 1950 statute. It has sought, however, to justify them on the ground that they are within "the spirit of the

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[22] In *Communist Party* v. *Subversive Activities Board*, 223 F. 2d 53, rev'sd on other grounds 351 U. S. 115, the Government filed a brief in the Court below addressed to the effect of the Internal Security Act of 1950 in which it said, *inter alia*:

> "Taken together these provisions remove a Communist organization member, who retains his membership with knowledge of its registration or a final order against it, from eligibility for a passport, and penalize a person who, knowing all such facts, presents himself as one eligible for passport or uses or attempts to use a passport" (Br. 29).
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> * * *
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> "We have no doubt but that Congress can withdraw from the discretionary powers delegated to the Secretary of State, the power to grant passports to a previously ascertained class which it finds is collectively promoting the interest of the World Communist movement. It can by identifying that narrow class with precision as one totally ineligible for passports, remove any question for further determination. This finds ample support in reason" (Br. 30).
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> * * *
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> "Finally, the prohibitions are reasonably adapted to meeting the problem. They are applicable only to members of Communist organizations who have knowledge or notice that such organization is so registered or that such order has become final, and who, knowing their ineligibility, apply for a passport despite such fact, or illegally use one. There is no question of coverage involved. Prior to making the application, a person knows whether he is a member of the organization. He is amply forewarned of the implications of his membership and has an opportunity to avoid the liabilities imposed on members. Violation of the passport prohibitions in every case must be deliberate" (Br. 31).

law." [23] But surely some nebulous "spirit" of the Act cannot be grounds for negativing its express terms. Congress expressly predicated passport ineligibility on *present* membership in an organization under a *final* registration order; this provision is contradicted by predicating passport ineligibility on present or former membership in organizations against whom a registration order has not been issued, or, if issued, has not become final.

It was for Congress, not the Secretary, to determine the manner in which its concern about the use of passports by Communists or Communist sympathizers was to be implemented. The Secretary was not authorized by the "spirit" of the legislation to implement his notion of Congressional desires by issuing regulations of a legislative character going far beyond the statute actually enacted by Congress. *United States* v. *Symonds*, 120 U. S. 46, 49-50; *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129; *Miller* v. *United States*, *supra*; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599; *Merritt* v. *Walsh*, 104 U. S. 694.

(b) *The Expatriation Act of 1868*

Secondly, as Judge Bazelon indicated in his dissenting opinion (R. 212-213), the Secretary's regulations conflict with the Congressional policy as set forth in the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999, favoring freedom of expatriation. That statute, although designed principally to protect immigrants to the United States, "is also broad enough to cover, and does cover, the corresponding

[23] See testimony of Scott McLeod, Administrator of the Bureau of Security and Consular Affairs, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, p. 192; see also testimony of A. J. Nicholas, Assistant Chief of the Passport Division, before the Internal Security Subcommittee of the Senate Judiciary Committee, August 1, 1951, 83rd Cong. 1st Sess., 13-14.

natural and inherent right of American citizens to expatriate themselves." *Savorgnan* v. *United States*, 338 U. S. 491, 498-499.

Plainly, expatriation is not possible without freedom to depart from one's country. The Secretary's regulations are invalid because they necessarily prevent expatriation and are, therefore, in conflict with the Act of 1868. See also 9 Op. A. G. 356-363.

C. The Claim of Inherent Power

The government relies finally upon the argument that the Secretary has inherent foreign relations power under the Constitution to deny passports to petitioners.

Since a passport is no longer merely a "political document" evidencing the fact of American citizenship (see *Urtetiqui* v. *D'Arbel*, 9 Pet. 692, 699) but "a tool with which the Department of State can prevent the presence of any American citizen in a foreign country" (R. 182), the power claimed is truly formidable.

The government's contention is untenable for two reasons: First, the regulations constitute law-making which is beyond the Executive's power; and, second, the denial of a passport to petitioners has nothing whatsoever to do with foreign relations.

This Court's decision in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, is decisive on the first point. Presidential "power must stem either from an Act of Congress or from the Constitution itself" (*id.* at 585); the President is constitutionally empowered to execute the laws, not to make them (*ibid.*).

The Secretary's establishment of classes of American citizens who may leave the country and of those who may not is a plain exercise of law-making authority beyond the

power of the Executive Branch.[24] The subject of foreign relations is not an exception to the constitutional restriction upon presidential law making. Even the President's great power in the field of foreign relations has been only exercised in such clearly non-legislative matters as the recognition of foreign governments, *United States* v. *Belmont*, 301 U. S. 324; *United States* v. *Pink*, 315 U. S. 203; and the determination as to whether an embargo authorized by Congress should be invoked, *United States* v. *Curtiss-Wright Export Corp.*,[25] 299 U. S. 304.

Secondly, the court below has itself recognized that "the issuance of a passport is not the conduct of foreign affairs." *Dayton* v. *Dulles*, No. 13,717, cert. grant. No. 621, Oct. Term, 1957. For as the regulations show, and as Judge Bazelon said below: "'Travel is being controlled today for purposes of internal security. To call it a matter of foreign relations is mere pretense" (R. 239).

The decision to confine particular citizens within the borders of the United States involves the relationship of the government to its own citizens and a restriction upon their liberty. This is not a matter of foreign affairs as it would

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[24] We have treated the regulations as if they had been promulgated by the President. However, any power to control travel, whether it stems from a statute or otherwise, would reside not in the Secretary of State but in the President. As noted by Judge Bazelon (R. 208-210), the President has never delegated to the Secretary any of the powers that he may possess as President to control travel. Assuming that so drastic a power were capable of delegation under 3 U. S. C. § 301, 65 Stat. 712, there has been no effort to apply or conform to that statute. (*Cf.* the Executive Orders in 3 U. S. C. § 301, 1957 Supp.).

[25] The situation here would be analogous to that of *Curtiss-Wright* if Congress had declared that certain definite classes of citizens could not leave the country upon the proclamation of an emergency by the President. By suggesting this analogy, we do not, of course, concede the constitutionality of such a statute. That issue would have to be decided upon the basis of the classes as defined in the hypothetical legislation.

be if it involved relations between this country and foreign powers.[26]

Finally, as Judge Bazelon said:

> "In our complex world there are very few pure internal affairs. Foreign problems cast their shadows on the domestic scene and internal events influence foreign policy. The Department of State has declared 'That there is no longer any real distinction between "domestic" and "foreign" affairs.' If that is so, the inherent power doctrine could produce an extension of the executive power beyond any limits theretofore conceived; and the President, through his Secretary of State could preempt the internal security functions of Congress" (R. 229-230).

III.

The Regulations on their face and as applied violate the Constitution.

A. They Impair First Amendment Rights

The fundamental vice of the regulations arises from their detrimental effect upon First Amendment freedoms of belief, speech and association. This is apparent from the language of the regulations, the Department's well known practices under them, and their application to the petitioners.

Under their aegis, the Department has imposed penalties upon petitioners because of past or present political associations, writings, or views, which are entirely lawful and therefore fully protected by the First Amendment.

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[26] An example of foreign relations is the abrogation in 1913 of our commercial Treaty of 1832 with Russia because of its discrimination against American Jews. See Learsi, *The Jews in America, A History* (1954) 224-229; *The American Jewish Year Book—5672* (1911), 19-128.

The regulations also impose a prior restraint upon the future exercise of such rights, preventing one petitioner from associating with his colleagues abroad and the other from the travel which in the past has been so fruitful a source of his writing and painting.

Denial of passports to these petitioners was based upon the exercise of lawful activities on the part of both petitioners. Thus, the Department claims to be in the possession of "reports of a confidential character" to the effect that between 1939 and 1951 Dr. Briehl had been associated with organizations cited by the Attorney General or the House Committee on Un-American Activities. The date of his alleged membership in the Communist Party was said to be 1945 (R. 165).

The charges against Mr. Kent are of the same general character. In addition to his greater exercise of this "dangerous freedom,"[27] of asso tion from 1936 to 1954, the candor of the Department's allegations is a frightening revelation of the extent to which the lawful activities of Americans are subject to governmental surveillance, are recorded in official dossiers and are made the basis for the denial of other constitutional rights.

These allegations merit closer analysis. Even Communist Party membership—that *bete noire* of the postwar period—enjoys the presumption of innocence and the protection of the First Amendment in the absence of personal activities in violation of the Smith Act or other criminal statutes. *Yates v. United States*, 354 U. S. 298.

In denying the relevance of this particular charge, petitioners of course make no admission as to the facts. It is, however, not without significance that the Department habitually charges Communist Party membership

[27] Smith, *A Dangerous Freedom* (1954), quoting De Tocqueville.

solely upon the basis of evidence of membership in organizations on the Attorney-General's list.[28]

The other charges are based upon associations with alleged radicals and organizations on the goverment's subversive lists or upon the expression of political views which meet with the Secretary's disapproval. Typical examples of these have been set out above (*supra*, pp. 5, 7, 8).

It is not without significance that this Court's decisions have vindicated the petitioners' position rather than that of the Secretary on many of these issues. See *e.g. Mesarosh* v. *United States*, 352 U. S. 1; *Yates* v. *United States*, *supra*; *Rowoldt* v. *Perfetto*, 78 S. Ct. 180; *Communist Party* v. *Subversive Activities Control Board*, *supra*.

These activities ascribed to petitioners are protected from government restraint by the First Amendment. *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234. Government officials may not determine what are good or bad ideas or good or bad organizations. *West Virginia Bd. of Education* v. *Barnett*, 319 U. S. 624; *Thomas* v. *Collins*, 323 U. S. 516, 545. They may not, as here, rely upon an organization's presence upon the Attorney General's list, *Barsky* v. *Board of University of State of New York*, 347 U. S. 442; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; or deny rights to citizens who are "wholly innocent of any unlawful purpose or activity". *Wieman* v.

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[28] Examples of this may be found in the records of *Nathan* v. *Dulles*, *supra*; *Foreman* v. *Dulles*, D. D. C. (C. A. 4924-54) and in the case of Dr. Linus Pauling, *Hennings* Hearings, *infra*, p. 43, where each of the persons involved was charged with Communist Party membership in the face of their sworn denials filed pursuant to § 51.142.

Updegraff, 344 U. S. 183,[29] because of membership in a "subversive" organization. In short, they may not, as here, adopt the principle of guilt by association. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242.

The fact that the sanction imposed upon a citizen for having the "wrong" ideas is confinement to this country rather than to a prison cell does not take the regulations outside the protection of the First Amendment. This Court has invalidated sanctions upon the exercise of First Amendment rights which were less direct and less oppressive. *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Thomas* v. *Collins*, 323 U. S. 516.

Moreover, as pointed out by this Court in *Watkins* v. *United States*, *supra*, at pp. 197-198, restrictions of this nature affect not only the specific individuals denied passports but the rest of our citizens, who find it expedient to modify their speech and associations in order to escape a similar fate. "If everyone who expects to travel must so comport himself as to satisfy the notions of Federal bureaucracy about political ideas, associations and activities, control over travel may well become a powerful instrument for Federal control of thought." Commager, *Where Government May Not Trespass*, New York Times Magazine, March 24, 1957, at p. 32.

We have shown how the Department seeks to use its power over the travel of American citizens in a negative sense—*i.e.*, to curb the exercise in this country of nonconformist ideas and associations. It seeks with equal impropriety to exercise its power in an affirmative sense

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[29] Judge Prettyman in the majority opinion below stated that he was construing the regulations as requiring scienter so as to comply with the requirement of the *Wieman* case (R. 191). But in upholding the right of the Secretary of State to refuse a passport to one who is a member of the Communist Party without more, he was ignoring the scienter requirement of the *Wieman* case, *supra*. Thus, his claimed construction of the regulations is in conflict with his holding.

by using such travel to mold opinion. Thus, in discussing the right of newsmen to travel to China, the Secretary's spokesman has said that "the Secretary of State's power to withdraw or withhold a citizen's passport * * * is designed as an instrument of foreign policy." O'Connor, *The State Department Defends*, Saturday Review, Jan. 11, 1958, 11 at p. 12.[30] Clearly, the control over travel is thus utilized to stifle criticism or promote espousal of a particular foreign policy.

It is illuminating to describe briefly the pattern of the State Department's conduct in this field since "in accordance with familiar principles, the * * * [regulations] must be tested by * * * [their] operation and effect." *Near* v. *Minnesota*, 283 U. S. 697, 708. The subject has received considerable scrutiny.[31]

Dr. Linus Pauling, the world renowned chemist, was refused a passport for two and a half years, beginning in 1952 (except for two passports of limited duration), on grounds including the Department's charge that an undisclosed source alleged that he was "a concealed member of the Communist Party," and a later charge of "a consistent and prolonged adherence to the Communist Party line."

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[30] See the response of Prof. Commager in the same issue of the Review at pp. 24, 70: "It is not in the best interest of the United States to induce conformity or to silence criticism by administrative penalties, for our system of government can flourish only where there is unrestricted criticism.

"It is not in the best interest of the United States to make travel—or travelers—an instrument of foreign policy, certainly not of the vagaries of State Department policy as ineptly interpreted by obscure officials."

[31] Comment 61 Yale L. J. *supra*, 174-179; Parker, *op. cit. supra*, 40 Virginia L. R. 857-861; Boudin, *The Constitutional Right to Travel*, 56 Columbia L. R. 46 (1956); Fosdick, *The Passport and the Right to Travel*, N. Y. Times Magazine, July 17, 1955, p. 8; Chew, *Passport Problems*, 12 Bulletin of the Atomic Scientists, 26 (Jan. 1956). The latter article is a reprint of Mr. Chew's testimony at the *Hennings* hearings, Nov. 15, 1955.

He received a passport from an embarrassed Department when he was awarded the Nobel Prize.[32]

Judge William Clark, formerly of the Third Circuit bench, was deprived of his diplomatic passport and his subsequent application for a passport was denied, the State Department holding that his desire to state his views in Germany on certain topics would be "inimical to the best interests of the United States." "The appropriate place" for such expressions, the State Department wrote, "is in the United States." He initiated suit and, after a Departmental hearing ordered by the District Court, *Clark* v. *Dulles*, 129 F. Supp. 950, he was given a passport.[33]

Dr. Martin Kamen, a scholar in the field of radiation physics and biochemistry, was repeatedly refused a passport from 1947 to 1955, on the ground that he was a supporter of the Communist movement, until he instituted a lawsuit against the Secretary.[34]

Dr. Otto Nathan, executor of the estate of Albert Einstein, was denied a passport for nearly two years, the State Department alleging in an affidavit filed in the Court below that the Department "after full and careful consideration has concluded that it would be contrary to the best interests of the United States" to issue one to him. *Dulles* v. *Nathan*, 225 F. 2d 29. When that court directed a quasi-judicial hearing as a condition to a stay sought by the Department, a passport was issued (*ibid.*).

These are only the more spectacular of the many cases that have occupied the courts, the press and the public the last five years. They establish incontrovertibly that the regulations have been used as an instrument to suppress

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[32] Pauling, *My Efforts to Obtain a Passport*, 8 Bulletin of the Atomic Scientists 253 (1952); and see testimony of Dr. Pauling and Administrator McLeod in *Hennings* hearings, 103-140, 155-209.

[33] *Hennings* hearings, pp. 141-155; Parker, *op. cit. supra*, 40 Virginia L. R. at 859.

[34] *Hennings* hearings, pp. 88-94, 212-214.

free expression, precisely their intendment and effect in the present cases.

Congress may abridge First Amendment rights only where "the gravity of the 'evil', discounted by its improbability justified such invasion of free speech as is necessary to avoid the danger." *United States* v. *Dennis*, 183 F. 2d 201, 212 adopted in *Dennis* v. *United States*, 341 U. S. 494, 510. The activities of the petitioners do not and cannot constitute any danger of any evil which Congress can legitimately touch.

Nor has the Government contended to the contrary. Instead, its argument has been that it may decline to give its diplomatic protection to citizens who are alleged adherents of the Communist movement. Here, it is sufficient for us to note first that whatever rights of protection do exist, inhere from the fact of citizenship, and not from the possession of a passport, Diplock, *Passports and Protection in International Law*, 32 The Grotius Proceedings 42, 45 (1946); and secondly, that there is no judicially enforceable right to such protection. See Bazelon, J. at R. 223; *United States ex rel. Keefe* v. *Dulles*, 222 F. 2d 390, 393-94, cert. denied, 348 U. S. 952.

This argument of the Government was in effect repudiated by the Court below by its recognition that the issue involved here was not that of the denial of diplomatic protection but rather the denial of the right to travel abroad. Instead, it offered two separate justifications for the acknowledged infringement of First Amendment rights, neither of which had been suggested by the Secretary.

Its first is that "Travel abroad * * * is obviously an easy method of communication between American Communist 'adherents' and the Soviet Union" (R. 191). The doctrine just quoted would deny to an amorphous group of "Communist adherents" the exercise of First Amendment rights abroad, *viz.*, communication, solely on the

ground that they had previously exercised such First Amendment rights. That the doctrine is irrational as well as noxious is indicated by the availability of alternative means of communication: The international mails, telephone and cables. We doubt that the court below would pursue its position to the logical end of authorizing the suspension of these means of communication for "adherents" of the Communist movement.

The second argument offered in justification is that "it is the unequivocal duty of the Department of State to prevent international incidents which might arouse hostile activities on the part of the Soviet Union or its satellites" (R. 191). This fanciful suggestion is unsupported by experience and the court below cited none. Moreover, on its face, it is self-contradictory.

We need not consider here the possible validity of travel regulations as legislation designed to control travel in order to prevent illegal activities abroad, or that might serve other conceivably legitimate purposes, *i.e.* such as the confinement to this country of one indicted and awaiting trial. None of the activities which fall within the scope of §§ 51.135 and 51.142 constitute illegal conduct of any kind,[35] nor is there any suggestion that the petitioners have engaged in illegal activity here or would engage in such activities abroad. Moreover, as indicated by Judge Bazelon below, legislation or regulations directed at the prohibition of travel in order to prevent illegal activities could be sustained only if narrowly drawn for that purpose (R. 51-52). Even then, important constitutional questions would arise with regard to governmental power to detain

[35] One portion of § 51.136, a section of the regulations not involved in petitioners' cases, provides for the denial of a passport "when it appears to the satisfaction of the Secretary of State that the person's activities abroad would violate the laws of the United States."

citizens for preventive purposes on suspicion alone and without evidence of guilt rather than as a preliminary to criminal proceedings based upon indictment for past unlawful activities. No decision in this Court has sanctioned such a doctrine of preventive detention.

B. They Impair Substantive Due Process

Under the regulations, the purpose of the citizen's travel is made irrelevant. Thus, here, the Department did not challenge the petitioners' stated purposes for traveling—in the one case to attend a medical convention, and in the other to paint pictures. In each case, the Department ruled that the petitioner's past political associations constituted a bar to his travel without regard to the purposes of such travel. Assuming, *arguendo*, the existence of power in the Secretary to restrain the movement of citizens through passport control or otherwise, such restraints are arbitrary and unreasonable unless related to the purpose of the travel rather than to the political heterodoxy of the citizen. The absurdity of the standards employed is epitomized by the statement that "The Department is not willing to grant you [Mr. Kent] passport facilities for travel to any countries for any purpose" (R. 10). This absence of rational basis constitutes a violation of due process under *Nebbia* v. *New York*, 291 U. S. 602 and *Schware* v. *Board of Examiners*, 353 U. S. 232.

C. Section 51.142 Imposes an Unconstitutional Test Oath

§ 51.142 requires the applicant to "subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist party." This is a test oath which Congress has never authorized, which in practice calls for much more than a statement of Communist party membership and which, when filed, is disregarded by the State Department.

In *Ex parte Garland*, 71 U. S. 333 and *Cummings* v. *Missouri*, 71 U. S. 277, this Court invalidated test oaths

involving the denial of criminal, even treasonable, conduct which had been made conditions, respectively, to the practice of law in the federal courts and the performance of religious duties. See also *Pierce* v. *Carskadon*, 83 U. S. 234.

This Court has upheld oaths confined to areas of public office or employment, *e. g.*, *Garner* v. *Board of Public Works*, 341 U. S. 716, and *Gerende* v. *Board of Supervisors*, 341 U. S. 56, and to the invocation of the complex functions of the National Labor Relations Board, *American Communications Association* v. *Douds*, 339 U. S. 382. The relief sought by petitioners is in none of these fields. They are not seeking government employment, and the only function which they require the respondent to exercise is that of issuing a passport, an administrative function performed half a million times a year. Unlike the *Douds* case, furthermore, where a non-signing union officer might continue his vocation and his union its functioning, 339 U. S. at 402, petitioners cannot lawfully travel without a passport.

Congress has never authorized the imposition of this oath upon persons wishing to exercise their right to travel. In this respect, the test oath in the present case is distinguishable from every one of the cases in which affidavits with respect to Communist party membership have been required. So drastic a substantive change in the exercise by citizens of their constitutional right to travel requires explicit legislative authority assuming that this can ever be done constitutionally. *Cf. United States* v. *Minker*, 350 U. S. 179; *United States* v. *Witkovich*, 350 U. S. 194.

Assuming, *arguendo*, that the Secretary can deprive a citizen of his right to travel, it is clear that this can only be done upon the basis of evidence justifying such denial. The imposition of the test oath is a device employed by the Secretary to evade his burden of producing evidence.

In *Cummings* v. *Missouri, supra,* at 330-332, this Court emphasized that the test oath "is not only a mode of inflicting punishment, but a mode in violation of all the constitutional guaranties, secured by the Revolution, of the rights and liberties of the people." It adopted Alexander Hamilton's statement that the oath technique was

> "* * * a subversion of one great principle of social security, to wit: that every man shall be presumed innocent until he is proved guilty. This was to invert the order of things; and, instead of obliging the state to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty * * *. Nothing can be more repugnant to the true genius of the common law than such an inquisition * * * into the consciences of men * * *. [The oath] substitutes for the established and legal mode of investigating crimes and inflicting forfeitures, one that is unknown to the Constitution, and repugnant to the genius of our law * * *."

Attempts to shift the burden of proof from the Government to the citizen have been stricken down in cases involving property rights, where such a shift was regarded as a denial of due process of law. *Goodyear Synthetic Rubber Corp.* v. *Department of Industrial Relations,* 122 N. E. 2d (Ohio) 503; *Philadelphia Co.* v. *S. E. C.,* 175 F. 2d 808, vac. as moot 337 U. S. 901; *Matter of Peck* v. *Cargill,* 197 N. Y. 391. In the last case, the New York Court of Appeals, stated: "It is not competent for the Legislature to place a citizen in such a disadvantageous position in order to protect his liberty or his property." (*Id.* at 395.)

Numerous courts, including the court below, have held invalid the imposition of test oaths as a condition to the use of public housing facilities. *Rudder* v. *United States,* 226 F. 2d 51. To the same effect see *Kutcher* v. *Housing Authority of Newark,* 20 N. J. 181, 119 A. 2d 1; *Lawson* v. *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N. W.

2d 605, cert. den. 350 U. S. 882; *Los Angeles Housing Authority* v. *Cordova*, 130 Cal. App. 2d 883, 270 P. 2d 216, cert. den. 350 U. S. 969; *Chicago Housing Authority* v. *Clark*, 4 Ill. 2d 319, 122 N. E. 2d 522.

In practical terms, the administration of the regulations by the Secretary has been such that, unlike the situation in *Douds*, execution of the oath has not resulted in the acquisition of the benefit. Dr. Linus Pauling, for example, "signed a half dozen or perhaps more affidavits for the State Department" during a period of two years, but he did not obtain a standard passport until after he received the Nobel award. Despite these affidavits by the distinguished scientist, the Department charged that he was a "concealed Communist" (*Hennings* Hearings, *supra*, pp. 110-11). Similar cases abound, *supra*, p. 44.

The oath required by § 51.142 refers, on its face, to membership in the Communist Party. Even if thus limited in practice, it is, in the Court's words, a "test oath * * * abhorrent to our tradition." *Girouard* v. *United States*, 328 U. S. 61, 64.[36] However, the Department in practice has expanded the test oath far beyond the limits of § 51.142. Dr. Briehl was asked to "set forth your connection with any other Communist front organizations with which you may have been associated" (R. 118). Mr. Kent in addition was asked to "submit any evidence of anything that you have done which has been opposite to the Communist Party line?" (R. 62). This well illustrates the truism that "once the power is given to government officials to inquire into the associations and opinions of private individuals, there is literally no limit to the expansion of inquisitions and the injustice which must inevitably result." O'Brian, *National Security and Individual Freedom* (1955) 41.

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[36] See also Dr. Henry J. Cadbury, Chairman of the American Friends Service Committee, quoted in Miller, *Three Questions and a Conscience*, Fellowship (Dec. 1957), pp. 91, 11.

The position taken by the District Court that the petitioners could not challenge the validity of the test oath because of their refusal to submit to it is clearly untenable. "The Constitution can hardly be thought to deny one subjected to the restraints of such * * * [a regulation] the right to attack its constitutionality, because he has not yielded to its demands." *Staub v. City of Baxley*, 78 S. Ct. 277, quoting from *Jones* v. *Opelika*, 319 U. S. 103.

D. The Regulations Violate Article I, Section 9

It is apparent from the language of the regulations that ineligibility for travel is based upon past conduct. The Department's practice is to evaluate an applicant's entire lifetime in order to determine whether it reflects a "[c]onsistent and prolonged adherence to the Communist Party line * * * " (§ 51.141). Indeed its recent dissatisfaction with being limited to a review of fifteen years of one citizen's life required a lawsuit before a passport issued. *Stewart* v. *Dulles*, 248 F. 2d 602; The Washington Post, Nov. 8, 1957, p. A. 17.

Thus, the allegations against petitioners relate exclusively to past conduct. They antedate even the promulgation of the regulations, except for Mr. Kent's assertion in 1953 of his constitutional privilege before the McCarthy Committee (R. 82).

The Department may plead that it can only determine the good character of petitioners by a review of their past conduct. But to deprive a citizen of the natural right of future movement—solely on the basis of an evaluation of his past record—is penal action retrospective in character and violative of Article I, § 9 of the Constitution. One may well inquire for how many years, in the Secretary's view, the petitioners are to be prevented from travelling by reason of past activities.

The regulations also proscribe the issuance of passports to persons who "are members of the Communist Party" § 51.135(a).[37] This disqualification of a group named by the legislature is the classic form of a bill of attainder. Hence, the evolvement by a cautious Congress of the elaborate proceedings of the Internal Security Act of 1950, *supra*, for the ascertainment of organizations to be denominated communist-action organizations. The Secretary, less well advised, has preferred to use the technique of the bill of attainder.

E. The Regulations Deny Procedural Due Process in Fundamental Respects.

The regulations offend due process by a three-pronged device: The vagueness of their criteria, the concealment of evidence, and the subjection of the applicant to an uncontrolled inquiry under oath as to his associations and beliefs.

The criteria set forth in § 51.135 (*supra*, pp. 2-3) are hopelessly vague. What are the "interests" of the Communist Party? What constitutes an act "in furtherance of the interests" and under its "discipline"? What is the "Communist movement"? What is "consistent and prolonged adherence to the Communist Party line"? § 51.141.

§ 51.136 presents equally difficult problems. What are acts which are "prejudicial to the orderly conduct of foreign relations" or "to the interests of the United States"? [38]

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[37] This is supplemented by another provision that "If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings." § 51.142.

[38] Under the Secretary's conception of the best interests of the United States, §51.136 would authorize and justify the revocation of the passport of former Ambassador George Kennan for his recent noteworthy broadcasts on foreign policy over the British Broadcasting System. This would be consistent with the Secretary's use of his passport power to prevent newspaper men from going to China, *supra*, p. 43, and with his earlier revocation of Judge Clark's passport, *supra*, p. 44.

These are meaningful questions in the light of a decade of passport policy. The distinguished roster of American citizens who have been denied passports shows the irrational breadth of these criteria. The kinds of conduct attributed to the petitioners and relied upon by the Secretary in this case (*supra*, pp. 4-6) confirms this view.

These standards are a mere facade under which even the limited requirements of *Bauer* v. *Acheson*, 106 F. Supp. 445, have been avoided for five years. The standards are no more definite than the terms "un-American" or "subversive", language condemned by this Court as not susceptible of definition. *Watkins* v. *United States*, *supra*; see also *Sweezy* v. *United States*, *supra*.

The vagueness of the standards is compounded by the use of vague evidentiary terms such as "under such circumstances as to warrant the conclusion" or "on the balance of all the evidence" particularly since under the regulations the evidence itself, if it exists, is concealed from the applicant. §§ 51.137, 51.163.

The use of a term that is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Company*, 269 U. S. 385, 391; *Small* v. *American Sugar Refining Company*, 267 U. S. 233, 238-240. The vagueness of the regulations is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, *supra*; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, *supra*; *Kunz* v. *New York*, 340 U. S. 290.

The problems created by the vagueness of the regulations are increased by the procedures adopted by the Passport Office. The proceeding is instituted by a letter of tentative denial in which the Secretary states that certain allegations have been made against the applicant (§ 51.137). The Secretary does not adopt the allegations as his own;

indeed, he has denied that they represent "charges."[39] Although these allegations are based upon reports of confidential informants of whom the Secretary usually has no knowledge,[40] the applicant is required to respond

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[39] Thus Mr. Scott McLeod when Administrator of the State Departments of Security and Consular Affairs testified with respect to the Department's letters denying Dr. Linus Pauling a passport as follows: "I think it was an allegation, not a charge or statement," *Hennings* Hearings, 188. Then ensued the following:

"Mr. Hocker: It is a little hard for a lawyer to understand the word 'allegation' in this sense. Who was making the allegation that he was a 'concealed member of the Communist Party?'

Mr. McLeod: Well, that I don't know. It is not set forth in the letter.

Mr. Hocker: Does not the letter mean that the State Department is making the allegation?

Mr. McLeod: I think to the contrary, because we do not collect the information as to who are members of the Communist Party." (*Hennings* Hearings, 194)

[40] The Department often does not know who the informants are. See the stipulation in *Kamen* v. *Dulles*, D. D. C., C. A. No. 1121-55 dated June 6, 1955, which appears in the *Hennings* hearings, 92-93. And see paragraph 4 of the affidavit of John Foster Dulles, dated January 11, 1956, in *Dulles* v. *Boudin*, *supra*, in the Court below:

"4. The information referred to in inquiry 3 was obtained from various sources. Those sources included:

(a) public source information such as newspapers, congressional documents, and other media of public information;

(b) informants whose identity is known to the Department and whose credibility has ben evaluated by the Department; and

(c) informants whose identity is not known to the Department, but whose credibility has been evaluated and made known to the Department by the Government agency furnishing the information."

In the *Hennings* Hearings, in discussing the Department's general practice, the following colloquy took place:

"Senator Hennings: So that in reply to Mr. Hocker's question your answer then, it would seem to me, would have to be, would it not, that such letters are written and have been written based upon information from sources unknown to the State Department?

Mr. McLeod: Yes, sir." (p. 195)

under oath in an affidavit with respect to Communist Party membership (§ 51.142) and related matters (*supra*, p. 5). *Cf. Matter of Peck v. Cargill*, *supra* at 393.

Subsequently the applicant receives a hearing at which no adverse witnesses appear and no evidence is presented against him. He alone is examined by the Passport Office with respect to the allegations in the Secretary's letter. He is required, as here, to embody his answers in an affidavit. § 51.137. Thereafter, the Passport Office renders a decision based upon secret evidence allegedly existing in its files (*id.*) This decision is made "after consultation with other interested officers" (§ 51.137) whose disclosures to the Passport Office are unknown to the applicant.

The applicant may thereafter appeal to the Board of Passport Appeals under whose procedures evidence is likewise concealed (§§ 51.151-51.170). The Board makes a secret recommendation to the Secretary, who then renders a decision in summary form because of "security considerations."

In five years under the regulations, it has not been the practice of the Department to produce witnesses to support allegations under §§ 51.135 or 51.136. That explains both the judicial criticism of its hearings, *Boudin v. Dulles*, 136 F. Supp. 218, aff'd and mod. 225 F. 2d 29; *Nathan v. Dulles*, 129 F. Supp. 951; *Clark v. Dulles*, 129 F. Supp. 950 and the grant of passports when open evidentiary hearings threaten the Department (*supra*, p. 44).

It is no wonder that former Secretary of State Acheson has described the basic loyalty program underlying these procedures as "a grave mistake and a failure to foresee consequences which were inevitable." *Acheson, A Democrat Looks at His Party* (1955) 127. In discussing that program, Mr. Acheson points out that "it was not realized at first how dangerous was the practice of secret evidence and secret informers, how alien to all our conceptions of

justice and the rights of the citizen, even though he was also an employee" (*id.* at 129). He concludes by criticizing the extension of such practices "to a citizen seeking a passport which the government requires before he may travel abroad" (*ibid.*).

Identically, unfair procedures were declared invalid by the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 277 F. 2d 708. This decision, not appealed by the Government, invalidated the Coast Guard regulations for the screening of merchant seamen. The case is of particular pertinence here because it has removed travel restrictions for so-called security reasons upon the hundreds of thousands of Americans employed as seamen.[4]

The decision in the *Parker* case follows the well established principle laid down by this Court that administrative action predicated upon undisclosed facts is invalid. *Morgan* v. *United States*, 304 U. S. 1, 18; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-304; *Lloyd Sabaudo* v. *Elting*, 287 U. S. 329, 335-336; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288-289.

A fuller analysis of the procedural deficiencies of the regulations appears in the brief for the petitioner in *Dayton* v. *Dulles*, *supra*.

Finally, we note that the procedures under the regulations involve certain dangers against which a citizen is constitutionally entitled to protection. In the absence of confrontation, the examination under oath of the pass-

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[4] The elimination of this program on the ground that the travel of seamen does not affect national security was recommended by a distinguished committee of lawyers. Report of the Special Committee on the Federal Loyalty Security Program of the Association of the Bar of the City of New York (p. 142).

Significantly, the Committee also recommended the termination of our International Organizations Employees Loyalty Program on the ground that national security did not require the screening of American citizens employed by the United Nations and other international public organizations here and abroad (p. 52).

port applicant with respect to a lifetime of associations and beliefs, on the basis of such vague criteria, creates a real danger of an unwarranted perjury prosecution, which recent history confirms. *Cf. United States* v. *Lattimore*, 215 F. 2d 847; *United States* v. *Lattimore*, 127 F. Supp. 405; *United States* v. *Remington*, 191 F. 2d 246, cert. den. 343 U. S. 907.[42]

Conclusion

These cases represent a new type of interference with civil liberty—liberty of movement. The Government has never presented any adequate justification for its wholesale denial of so vital a right of Amerian citizens. The Secretary has arrogated this power to himself without either legislative or constitutional justification.

His passport regulations, substantively and procedurally, go far beyond anything authorized by the Congress or the President. They openly seek to prevent the future exercise of First Amendment rights because of governmental disapproval of the manner in which such rights were previously exercised.

The issues in this case have been well summarized by Judge Edgerton below:

> "The Secretary proposes to continue restricting the personal liberty of a citizen because statements by informants whom the Secretary does not identify have led him to think that if the citizen goes abroad he will do something, the nature of which the Secre-

[42] On vagueness, in connection with compulsory testimony in the political area, see *O'Connor* v. *United States*, 240 Fed 2d 404; *Bridges* v. *United States*, 199 F. 2d 811, rev. 346 U. S. 209 and *United States* v. *Hautau*, 43 Fed. Supp. 307; see also briefs for the parties in this Court, *Gold* v. *United States*, 352 U. S. 985, reflecting the kind of evidence deemed sufficient for a conviction in cases involving charges of Communist Party membership.

tary does not suggest, which the Secretary thinks, for reasons known only to him, will be contrary to what, for reasons known only to him, he conceives to be 'the national interest.' If Congress or the President had undertaken to authorize this, serious constitutional questions would arise. May the government deprive a citizen of his constitutional liberty to go abroad (1) without a jury trial, (2) without a definite standard of guilt, (3) without sworn testimony, and (4) without an opportunity to confront his accusers or know their identity? May it deprive him of this liberty because of the way he has exercised his First Amendment rights of free speech, press, and assembly? * * * But neither Congress nor the President has undertaken to give the Secretary the authority he claims" (R. 241).

From this summary, Judge Edgerton concluded:

"We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world" (R. 240).

Respectfully submitted,

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Appendix

22 U. S. C. § 211a

The Act of July 3, 1926, 44 Stat. 887, 22 U. S. C. § 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

22 U. S. C. § 212

The Act of June 14, 1902, 32 Stat. 386, 22 U. S. C. § 212 provides, in pertinent part, as follows:

> No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

Internal Security Act of 1950, § 6

Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. § 785 provides, in pertinent part, as follows:

> (a) When a Communist organization as defined in paragraph (5) of section 782 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

8 U. S. C. § 1185

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185, as codified, provides in pertinent part:

§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) [There follow restrictions enumerated (1) through (7) not here pertinent.].

* * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

The Expatriation Act of 1868

The Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999, 8 U. S. C. § 800 (1940 Supp.) reads as follows:

"WHEREAS the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government."

Proclamation 3004

The pertinent portions of Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. c31, entitled "Control of Persons Leaving or Entering the United States By the President of the United States of America", are as follows:

A PROCLAMATION

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws there-

of the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provisions of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

Executive Order No. 7856

Executive Order No. 7856, 22 CFR §§ 51.1-51.74 is entitled and constitutes the "Rules Governing the Granting and Issuing of Passports in the United States." Several typical excerpts from that extensive document are set forth to indicate that it relates to procedural rather than to substantive matters:

* * *

3. Unless a request is made by the parental or other guardian that a passport be denied, passports may be issued to minors upon their own application.

4. Children may execute applications in their own behalf when of sufficient intelligence to understand the statements, and the meaning of the oath of allegiance to the United States, contained in the applications.

* * *

10. A minor brother or sister may be included in the passport of an older brother or sister.

* * *

39. The applicant must submit with his application duplicate photographs not more than 3 by 3 inches and not less than 2½ by 2½ inches in size, unmounted, printed on thin paper on a light background, showing the full front view of the features of the applicant, and taken within six months of the date they are submitted.

40. When the applicant applies for a passport he should be accompanied by one credible witness who is an American citizen, has known the applicant for a period of two or more years, and has a definite place of residence.

* * *

101. A person born abroad whose father was born in the United States and at the time of the applicant's birth had not ceased to be a citizen of the United States must submit with his application evidence of the father's birth in this country as required in the preceding paragraph.

* * *

119. The Secretary of State may require such additional evidence of citizenship as in his judgment may be necessary to establish the citizenship of an applicant for a passport.

* * *

124. The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

125. Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of these rules, the protection of the United States may be withdrawn from him while he continues to reside abroad.

126. The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to these rules and not inconsistent therewith.

* * *

Regulations of the Secretary of State

22 CFR §§ 51.135-51.143

On August 28, 1952 the Secretary adopted the passport regulations herein involved with the following preamble (17 F. R. 8013):

> Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887; 22 U. S. C. 211(a)), the regulations issued on March 31, 1938 (Departmental Order 749) as amended (22 CFR 51.101 to 51.134) are hereby further amended by the addition of new sections 51.135 to 51.143 as follows:

The regulations, as amended, read as follows:

> § 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interest and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who en-

gage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136* *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interest of the United States.

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* Prior to the Secretary's amendment of January 18, 1956, 21 F. R. 336, this section read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

§ 51.137 *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138 *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139 *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of

procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140 *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action its finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141 *Bases for findings of fact by Board.*—(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135 (b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.* *Applicability of Sections 51.137-51.142.* Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

22 CFR §§ 51.151-51.170

The Rules of the Board of Passport Appeals promulgated by the Secretary on January 4, 1953 have the following preamble (19 F. R. 161):

Pursuant to the authority vested in the Board of Passport Appeals by the Regulations of the Secretary of State issued on August 28, 1952 (17 F.R. 8013; 22 C.F.R. 51.139) and pursuant to the authority vested in the Secretary of State by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F.R. 681; 22 C.F.R. 51.77); under authority of section 1 of the act of Congress approved July 3, 1926 (44 Stat. 887; 22 U.S.C. 211(a)), the regula-

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* Prior to the Secretary's amendment of January 18, 1956, 21 F. R. 336, this section read as follows:

"§ 51.143 *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

tions issued on March 31, 1938 (Departmental Order 749) as amended (22 C.F.R. 51.101 through 51.143) are hereby further amended by the addition of the following Rules of the Board of Passport Appeals as adopted by the Board, and approved by the Secretary for incorporation as sections 51.151 through 51.170 of Subpart B of Part 51 of 22 C.F.R.:

They read as follows:

§ 51.151 *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152 *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153 *Counsel to the Board.*—A Counsel to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154 *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who

may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155 *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156 *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by rgistered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writ-

ing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161 *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise

applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearings shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168 *Transcript of hearings.*—A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169 *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall

be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170 *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

* * *

22 CFR §§ 53.1-53.8

The pertinent portions of the Secretary's regulations entitled "Control of Persons Entering and Leaving the United States in Wartime" are as follows:

§ 53.1 *Limitations upon travel.*—No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3 * * *.

§ 53.2 *Exceptions to regulations in § 53.1.* No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North Central or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1-53.9: * * *.

* * *

§ 53.5 *Prevention of departure from or entry into the United States.* (a) Nothing in this part shall be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States unless he bears a passport, card of identification, or other document of identity issued by or under authority of the Secretary of State, notwithstanding the fact that he may be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

(b) Nor shall anything in the regulations in this part be construed as prohibiting the Secretary of State or his representative at a port in the United

States from preventing temporarily the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States, notwithstanding the fact that such person may bear a valid passport, card of identification, or other document of identity issued by or under authority of the Secretary of State or be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

* * * *

§ 53.8 *Discretional exercise of authority in passport matters.*—Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.